IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,248

JAMES FRANKLIN ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

JOHN S. SOMMER
Staff Attorney
Florida Bar No. 0862126

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

PRELIMINARY STATEMENT

This is in reply to the State's Answer Brief filed 30 August 1991. References in this brief are as follows: The trial and original sentencing record is cited as "T. ___" with the appropriate page number following thereafter. The resentencing record is cited as "S. ___". The record on appeal in these post-conviction proceedings is cited as "R. ___". All other references are self-explanatory or otherwise explained.

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ARGUMENT I

THE CIRCUIT COURT ERRED IN THE MANNER IN WHICH IT TREATED THE MOTION TO VACATE AND IN ITS SUMMARY DENIAL OF RELIEF AND THIS CASE SHOULD BE REMANDED FOR A FULL AND FAIR EVIDENTIARY HEARING.

Mr. Rose's initial brief presented two issues in this argument: 1) the circuit court erred in not allowing an evidentiary hearing, and 2) the circuit court erred in its treatment of Mr. Rose's Motion to Vacate. The first issue concerns the conclusory, non-record manner in which the 3.850 motion was denied without a hearing, and the second issue concerns the lack of notice/due process violations involved in the circuit court's wholesale adoption of the State's proposed order.

In the circuit court, in response to Mr. Rose's Motion to Vacate, the State conceded, "it [was] necessary to hold an evidentiary hearing" to determine the validity of many of Mr. Rose's claims (R. 117, Response to Motion to Vacate). However, the trial court summarily denied Mr. Rose's Motion to Vacate (R. 481-87). In its answer brief, the State takes a position contrary to its position in the circuit court, arguing, "the trial court's order states a rationale that is based on the record which either refutes the claim or demonstrates that relief is not warranted" (Answer Brief at 5). The trial court's order did not make one specific reference to the record, but instead made only brief, general references to the entire record, the exact method of denying a Rule 3.850 motion which this Court condemned in Hoffman v. State, 571 So. 2d 449 (Fla. 1990). The Rule 3.850 standard is that an evidentiary hearing is required unless the "records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). Since the trial court's order did not provide a single record cite and thus failed to conclusively refut Mr.

Rose's factual allegations,[1] and since those allegations make out a prima facie case for relief, Mr. Rose is entitled to an evidentiary hearing.

Regarding the second issue, the State merely argues that the circuit court's adoption of the State's proposed order does not violate due process (Answer at 5-6). This argument simply ignores the extent of the due process violations resulting from the circuit court's treatment of Mr. Rose's Rule 3.850 motion. Mr. Rose's argument is not just that the circuit court adopted the State's proposed order, but that Mr. Rose was given no notice that the circuit court was about to rule on the motion nor that the State had provided a proposed order, and thus was given no opportunity to object to this procedure or to the erroneous conclusions contained in the State's proposed order. Regardless of whether the trial court contacted and/or consulted with the State or the State sua sponte wrote the proposed order, Mr. Rose was denied notice and an opportunity to be heard. Either the State or the State and the court ruled on Mr. Rose's factual allegations, and the State cannot be both Mr. Rose's party opponent and judge.[2]

The trial court adopted, in its entirety, the State's proposed order wwithout any notice to or opportunity to be heard by Mr. Rose. This violates due process and Rule 3.850. Mr. Rose is entitled to fair, impartial consideration of his Rule 3.850 motion and to an evidentiary hearing.

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[1]Mr. Rose pled both record and non-record facts. Unless the non-record facts are specifically and conclusively contradicted by the record (the trial court provided no cites), they must be individually considered by the trial judge and require a hearing. Simply being the judge who presided at trial does not help determine the validity of non-record facts.

[2]If the court and the State had any ex parte communications regarding the order, then this violates Love v. State, 569 So. 2d 807 (Fla. 1st DCA 1990), and requires the trial court to recuse itself from any future proceedings.

ARGUMENT II

MR. ROSE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF THESE CAPITAL PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In the circuit court, the State conceded that many aspects of Mr. Rose's ineffective assistance of counsel claim required an evidentiary hearing (R. 117, Response to Motion to Vacate). On appeal, however, the State argues that the circuit court properly denied the Rule 3.850 motion without an evidentiary hearing. Aside from the inconsistency of these two positions, the State's current position rests upon an erroneous view of the record, an oversimplification of Mr. Rose's allegations, a misunderstanding of Rule 3.850, and a failure to consider applicable precedent.

Substantial evidence was readily available at the time of trial in support of Mr. Rose's defense that he did not murder Lisa Berry and in support of a life sentence. None of this evidence was presented by defense counsel. Despite the availability and relevance of this evidence, the State argues that the trial court's summary denial of the Rule 3.850 motion was correct because, according to the State, the State's guilt and penalty cases at trial were strong. This argument, however, fails to recognize that the facts proffered in Mr. Rose's Rule 3.850 motion call into question essential aspects of the State's case and provide affirmative support for Mr. Rose's defense and for a life sentence. The facts pled in the Rule 3.850 motion alter the entire picture presented at trial, establishing that trial counsel's performance was deficient and that the deficient performance undermines confidence in the outcome of Mr. Rose's capital proceedings. An evidentiary hearing is required.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> [A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). To insure that a true adversarial testing, and thus a fair trial, occurs, the Constitution imposes

obligations upon defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688.

Here, Mr. Rose was denied a reliable adversarial testing due to defense counsel's repeated failures to investigate and prepare. Consequently, the jury never heard and considered compelling material evidence in support of Mr. Rose's defense and in support of a life sentence. The deprivation of a defendant's right to a fair adversarial testing requires a reversal when there is a reasonable probability that the outcome could have been affected, undermining confidence in the results. Strickland.

In response to some of the factual allegations in Mr. Rose's Motion to Vacate, the State answered with factual challenges. In fact, the State attached an appendix to its Answer Brief which is replete with facts not heard or viewed by the trial court. The State-created, on-the-record inconsistencies require an evidentiary hearing. This is an appellate court and the facts cannot be assessed or weighed without a fact-finding hearing. The State has previously conceded a hearing is necessary on many of Mr. Rose's claims, and the State's appendix established the need for an evidentiary hearing. Rule 3.850 mandates an evidentiary hearing.

A. GUILT PHASE

The State's arguments regarding Mr. Rose's guilt phase ineffective assistance of counsel claim ignore the principle that defense counsel's duty is to ensure that an adversarial testing occurs. At trial, the jury heard a one-sided presentation -- the State's case. Ample evidence was available contradicting the State's theory, but the jury heard none of it. As a result of counsel's omissions, no adversarial testing occurred, and confidence in the outcome is undermined.

By ignoring defense counsel's duty to ensure an adversarial testing, the State argues that disagreement over the nature of the murder weapon would not have affected the outcome (Answer Brief at 7-8). However, the State fails to recognize that the hammer blow theory was an essential part of the State's

case at trial. The State made much of finding a hammer in the canal in which the victim's body was found (T. 1057), and emphasized that Mr. Rose, a painter by trade, had no hammer in his van when it was searched. The jury and court heard that Mr. Rose was questioned about a hammer (T. 1057). Also, the State called two witnesses in an attempt to link Mr. Rose to the hammer by comparison of paint residue on the hammer with paint samples from Mr. Rose's van (T. 1117-1331; 1142-45). The State argued that Lisa Berry died because of three blows to the head in opening (T. 649) and closing (T. 1219), and that it was "reasonable to assume the hammer was thrown that night" (T. 12-13).

Linking the hammer to Mr. Rose would have been meaningless without showing that it was used in the offense. The State's medical examiner, Abdulleh Fatteh, testified that the cause of Lisa Berry's death was severe head injuries (T. 677). Those injuries, he testified, were caused by blunt force (T. 678). Dr. Fatteh testified the instrument used "could be a hammer" (T. 686). On cross-examination, Dr. Fatteh continued with his hammer theory. He said that even if Lisa was hit by a hammer, there would not necessarily be a fracture to the skull (T. 699).

As explained in Mr. Rose's initial brief (pp. 13-15), a qualified medical examiner, Dr. Joseph H. Davis, could have testified that the victim's injuries could <u>not</u> have been caused by a hammer. This testimony would have thoroughly countered the State's reliance on the hammer and its implications that use of the hammer indicated the victim's death was caused deliberately by Mr. Rose. The failure to present this evidence undermines confidence in the outcome.

Continuing in the same vein of ignoring counsel's duty to ensure that an adversarial testing occurs, the State also contends that evidence challenging the State's trial theory regarding the time at which events occurred would not have affected the outcome (Answer Brief at 8-10). The State appears to be saying that since the State presented evidence at trial indicating events occurred at a particular time, evidence contradicting the State's evidence

somehow does not matter. However, evidence contradicting the State's trial evidence is precisely what was necessary for an adversarial testing.

The State's contentions ignore the fact that "time" was a crucial issue in this case. The State's theory hinged on proof that Lisa Berry left the bowling alley with Mr. Rose between 9:30 and 10:00 p.m., and that Lisa was dead when Mr. Rose called her mother at 10:23 p.m. The State repeatedly argued this theory in closing, arguing that Mr. Rose and Lisa left the bowling alley between 9:30 and 10:00 p.m. (T. 1215-16, 1219), that Lisa was with Mr. Rose and injured at the time of the 10:23 p.m. phone call (T. 1220), that Lisa's death had occurred between the time Mr. Rose left the bowling alley and made the 10:23 p.m. phone call (T. 1226), and that Mr. Rose then disposed of her body and returned to the bowling alley by 11:30 p.m. (T. 1226). Defense counsel, however, argued that Lisa was alive and at the bowling alley at 11:00 p.m. (T. 1234), based upon Walter Isler's statement to police that he had seen her there at some time "going on 11."

Although making this argument, defense counsel did not present the statements of Isler or the other witnesses who saw Lisa at the bowling alley well after the time the State contended she had been murdered. The State argues that defense counsel was not ineffective for failing to present Isler's statement. The State contends that it was enough for defense counsel to ask the witness if he had made a prior statement regarding the last time he had seen the victim (Answer Brief at 8), although the witness said he did not remember what his statement was (T. 757) and although the prosecutor argued to the jury that the witness had denied making the statement (T. 1215). Defense counsel could have affirmatively established what the witness had told the police either by introducing the statement or calling the detective who took the statement. Similarly, the other statements discussed in Mr. Rose's

initial brief (pp. 17-20) would have supported defense counsel's argument and countered the State's theory.[3]

The State presents some non-record factual responses to Mr. Rose's factual allegations. Resolution of this factual dispute requires a hearing. In addition, the trial court's order denying Mr. Rose Rule 3.850 relief is devoid of any record cites or specific attachments in violation of Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). Mr. Rose is entitled to an evidentiary hearing as previously agreed to by the State on many facets of Mr. Rose's ineffective assistance of counsel claim.

B. PENALTY PHASE

Mr. Rose's initial brief (pp. 28-31) explained that defense counsel at resentencing failed to investigate, develop and present substantial available mitigating evidence, for no tactical or strategic reason. Mr. Rose's initial brief (pp. 31-34) also summarized the mitigating evidence which could have been presented had counsel properly investigated and prepared. The States's response contends:

> A review of the record demonstrates that such evidence is either rebutted by the record, contrary to the defense strategy employed or simply too weak to overcome the strength of the aggravating factors present.

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[3]The State requests that this Court "require appellant to supplement the record" with the statements of the five witnesses who contradicted the State's theory as to when the victim and Mr. Rose were last seen at the bowling alley. The State contends that it cannot assess the "exculpatory value" of these statements without viewing the statements. The statements were pled in the Rule 3.850 motion and must be accepted as true at this juncture because no evidentiary hearing was held. If the State is contesting the truth of the statements, that position demonstrates the need for an evidentiary hearing. An evidentiary hearing is the only proper manner to assess the evidentiary value of these statements.

The State contests the truth of other allegations presented in the Rule 3.850 motion. For example, Mr. Rose claims that the white van seen that night was different from Mr. Rose's. Jim Hughes' deposition reveals that Mr. Rose's van had monkey decals, but the van he saw on the night of the offense did not (Hughes deposition, p.13). The State's Answer speculates that "it is not beyond the realm of possibility that appellant removed the decals prior to that night" (Answer Brief at 11). The State provides no record cite and resolution of this factual dispute requires a full and fair hearing. Unless there is a hearing, Mr. Rose's factual allegations can only be rebutted by an attachment of the record and the files that conclusively shows that Mr. Rose is entitled to no relief. No such records and files were attached to the trial court's order.

(Answer Brief at 18). The State's arguments are incorrect and, in fact, establish that an evidentiary hearing is required.

The trial court found three aggravating circumstances: the crime was committed while under sentence of imprisonment, defendant was previously convicted of a felony involving use or threat of violence to the person, and the murder was committed while the defendant was engaged in the commission of the crime of kidnapping. These are not overwhelmingly strong aggravating circumstances, as the State contends. The first two aggravating circumstances stem from the same prior offense. As to the first aggravator, Mr. Rose "did not break out of prison" but was merely on parole, which diminishes the gravity of the first aggravating circumstance. Songer v. State, 544 So. 2d 1010 (Fla. 1989).

Moreover, the State's argument that the presentation of mitigation would not have mattered because of the aggravating factors is erroneous under the Eighth Amendment. In arguing that because of the aggravating factors "no amount of . . . mitigating evidence could change the result," the State presents an argument which "in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances." Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1987). The question is whether the available but unpresented mitigating evidence would have established a reasonable basis for a life verdict from the jury. Hall v. State, 541 So.2d 1125 (Fla. 1989).[4] The types of mitigating evidence discussed in Mr. Rose's initial brief do provide a reasonable basis for a jury's life verdict. See, e.g., McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982) (good behavior in prison and rehabilitation potential provide reasonable basis for jury's life recommendation); Buford v. State, 570 So. 2d 923, 925 (Fla. 1990) (history of alcohol abuse since teenager provides

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[4]The State somehow finds it significant that this Court has previously said a jury override would have been sustained in Mr. Rose's case (Answer Brief at 20). However, this Court made that statement on the basis of the direct appeal record, and was not considering evidence such as was proffered in these Rule 3.850 proceedings. This evidence is valid mitigation which defense counsel had a duty to develop and present, and which would establish a reasonable basis for a life recommendation.

reasonable basis for jury's life recommendation); Duboise v. State, 520 So. 2d 260, 266 (Fla. 1988) (deprived family background provides reasonable basis for jury's life recommendation).

Without conducting an evidentiary hearing, the trial court denied Mr. Rose Rule 3.850 relief without specifically addressing any of the mitigation presented by Mr. Rose's Motion to Vacate. The trial court did not attach any portions of the record or the files conclusively showing that Mr. Rose was entitled to no relief. The State now contends that Mr. Rose's claim is rebutted by the record. However, the "record" upon which the State relies is an appendix attached to their Answer Brief. Thus, this Court has been presented facts never analyzed by the trial court. The State's reliance upon this appendix establishes the need for an evidentiary hearing. This Court is an appellate not a trial court, and is not the proper forum for the resolution of factual disputes.

Moreover, the State's appendix, in large part, provides evidence supporting Mr. Rose's allegations. For example, the State's appendix includes DOC records which reveal: Mr. Rose had a history of alcohol abuse and "participation in AA while incarcerated" (App. 1 at 1). Mr. "Rose currently reports a history of daily abuse of alcohol beginning in his early teenage years, and that he began mixing whiskey and beer at age 18 . . . isolated instances of use of cocaine and/or marijuana, but no regular use or abuse" (App. 1 at 1). Mr. Rose refused counseling not because he was in denial or uncooperative but because he felt "bringing your problems to someone else means you're weak" (App. 1 at 1). Mr. Rose has "maintained a clear disciplinary record on his previous incarceration and is also maintaining a clear disciplinary record on this sentence" (App. 3 at 1). "[A]t this time the subject is receiving very good quarters reports . . . and is not considered to be a problem at this time" (App. 3 at 1). "[S]ubject [Mr. Rose] states that he wants to make a fresh start" (App. 3 at 2). "He [Mr. Rose] will make a satisfactory adjustment . . . and will not be any problems to this institution" (App. 3 at 2). Dr. Eichert's report of 5 October 1971 states

that Mr. Rose is mentally ill (although not "legally insane") and that "people with this kind of illness generally do not respond to psycho therapy unless they are in a total therapeutic situation" (App. 3 at 6)(emphasis added). Mr. Rose "was considered a 'slow student' and scored 84 in an IQ test administered to him in 1961" (App. 3 at 6). When upset by a prison search that left his mother's picture torn in half and legal papers torn, Mr. Rose "did not make any direct threat to [the guard] personally" (App. 2). Mr. Rose was an illegitimate child (App. 3 at 5). "[I]t appears there was an animosity between the defendant and his stepfather during his informative years" (App. 3 at 6). Mr. Rose completed school only up to the seventh grade and left home at age 17 (App. 3 at 6). Mr. Rose fell in love with Judy Crump and supported her and her two children for over a year before being accused and charged with this offense (App. 3 at 6). Mr. Rose had been a little league coach (App. 3 at 6). Mr. Rose was entitled to a hearing based on his factual allegations alone, but the State's appendix before this Court mandates an evidentiary hearing. The files and records do not conclusively rebut Mr. Rose's factual allegations.

Mr. Rose disputes the State's argument (Answer Brief at 19) that Mr. Rose suffered from no mental illness because he did "not suffer from any psychosis." Mental illness is a much broader term than the State argues and this is evidenced in the State's appendix -- Dr. Eichert's report stated, "Mr. Rose is mentally ill" although not insane (App. 3 at 6). Mental health mitigation is certainly broader than insanity. See Perri v. State, 441 So. 2d 606 (Fla. 1983); Kenley v. Armontrout, 937 F.2d 1298, 1307 (8th Cir. 1991).

The State's final contention -- that presentation of the mitigating evidence discussed in Mr. Rose's initial brief was contrary to the strategy defense counsel pursued at the penalty phase -- begs the question. Mr. Rose has alleged that defense counsel failed to investigate and prepare for the penalty phase, and had no tactic or strategy for his failures. A failure to investigate and prepare precludes the making of any tactical or strategic decisions, as this Court has explained:

> According to the principles established in Strickland v. Washington, "counsel has a duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S. Ct. at 2066. Trial counsel claims that it was a matter of strategy not to develop a case in mitigation. "A strategic decision, however, implies a knowledgeable choice." Eutzy v. State, 536 So. 2d 1014, 1017 (Fla. 1988) (Barkett, J., dissenting). It is apparent here that trial counsel's failure to investigate and present mitigating evidence was not the result of an informed decision because trial counsel was unaware the evidence existed.

Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989). Here, trial counsel failed to investigate and prepare, and thus the course he ultimately followed at the penalty phase cannot be characterized as reasonable or as a strategic decision.

The failure to investigate and prepare and the resulting failure to present ample available mitigation is ineffective assistance of counsel. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Trial counsel has a duty to develop and present mitigating evidence. Stevens. See also Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) ("defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors"). Failure to do so requires resentencing. Mitigation serves a specific constitutional purpose -- ensuring reliability and individualized sentencing. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Rose never received an individualized capital sentencing determination. An evidentiary hearing and relief are proper.

ARGUMENT III

THE MANNER IN WHICH LISA BERRY WAS KILLED WAS MISREPRESENTED AT TRIAL, EITHER BECAUSE OF AN INCOMPETENT MEDICAL ASSESSMENT, THE STATE'S USE OF FALSE OR MISLEADING TESTIMONY, OR BOTH, RENDERING THE CONVICTIONS AND DEATH SENTENCE VIOLATIVE OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State knew it was presenting the "hammer blow" theory although no evidence demonstrated that the murder weapon was a hammer. Thus, the theory was misleading and inaccurate.

The State's Answer Brief argues that Mr. Rose's claim is procedurally barred because it was known prior to direct appeal and should have been raised then (Answer Brief at 24). The State fails to recognize that the facts demonstrating the misleading nature of the State's theory and evidence were not in the direct appeal record, and thus that the claim could not have been raised on direct appeal. Founded on Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), this claim is properly brought in a Rule 3.850 motion and requires an evidentiary hearing. See Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

The State erroneously distinguished Troedel v. Wainwright, 667 F. Supp. 1456 (SD Fla. 1986), because Troedel involved two separate trials with conflicting testimony. However, like the prosecution's expert in Troedel, Dr. Fatteh admitted that he could not testify with scientific certainty that a hammer caused the victim's injuries. In addition, like the additional expert's deposition introduced in Troedel, Dr. Davis' deposition indicated that it could not be scientifically determined that a hammer caused the victim's injuries. Therefore, the holding in Troedel is applicable to Mr. Rose's case:

> In light of the foregoing, the Court finds the opinion that Troedel had fired the murder weapon was not based on scientific certainty and, therefore, at the very least, was misleading.

Troedel, 667 F. Supp. at 1459. As in Troedel, the State used this misleading evidence to support its misleading "hammer blow" theory.

The State knowingly elicited false and/or misleading testimony from Dr. Fatteh regarding the State's hammer theory that went uncorrected. Mr. Rose was denied a fair trial, and at the very least the claim deserves an evidentiary hearing.

ARGUMENT IV

THE STATE'S KNOWING USE OF FALSE TESTIMONY CONCERNING, AND COUNSEL'S INEFFECTIVENESS IN FAILING TO CHALLENGE THE ADMISSION OF MR. ROSE'S STATEMENTS VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In pretrial depositions and testimony at the suppression hearing in Mr. Rose's case, police officers led the court and defense counsel to believe that Mr. Rose had made only a sham phone call to an attorney during police interrogation and therefore that Mr. Rose had not requested the assistance of counsel during interrogation. A police report discovered during post-conviction reveals, however, that police officers knew, in fact, that Mr. Rose had contacted an attorney and that the attorney had refused to represent Mr. Rose because of a prior debt. Police officers therefore did know that Mr. Rose had requested the assistance of counsel and would have obtained that assistance but for his indigency. Nevertheless, the police initiated further questioning of Mr. Rose. The police report revealing that Mr. Rose had indeed requested counsel was not disclosed to defense counsel, who therefore could not pursue a Sixth Amendment challenge to Mr. Rose's statements.

In its answer, the State fails to grasp these facts. The State relies upon the facts which were disclosed at trial,[5] failing to understand that the crucial facts -- that Mr. Rose really had requested an attorney and had not made a sham call -- were not disclosed, but were misrepresented at the time of trial. The basis of the claim, therefore, is not something which was known at trial or before the direct appeal, as the State argues (Answer Brief at 28).

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[5]The State thus argues, for example, that Mr. Rose admitted that the phone call was made to stall for time (Answer Brief at 28), failing to understand that this is what the police officers said at the time of trial and that the undisclosed police report reveals this was not true. The State also argues that there is no evidence that the police officers called the attorney whom Mr. Rose had contacted (Answer Brief at 29), but that is precisely what the undisclosed police report indicates.

The State also does not understand the appropriate standard of review for a claim involving the State's use of false or misleading testimony, arguing that Mr. Rose must establish "prejudice" or that the undisclosed information would have resulted in the suppression of Mr. Rose's statements (Answer Brief at 29). However, in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the [outcome]." Bagley, 105 S. Ct. at 3382 (quoting Agurs, 427 U.S. at 102). This is in essence the Chapman v. California, 386 U.S. 18 (1967), harmless beyond a reasonable doubt standard. Bagley, 473 U.S. at 679 n.9. Here, knowingly, the State allowed false and misleading testimony to go uncorrected at the suppression hearing. In fact, the State used false evidence to coerce the defense into not adequately challenging the admission of Mr. Rose's statements. Certainly, this cannot be harmless beyond a reasonable doubt.

Defense counsel was led to believe that Mr. Rose made only a sham call. The defense did not know this was false evidence. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington, 466 U.S. 668 (1984). However, the prosecution interfered with counsel's ability to provide effective representation and ensure an adversarial testing. United States v. Cronic, 466 U.S. 648 (1984). The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation. An evidentiary hearing and relief are proper.

REMAINING ARGUMENTS

As to the remaining arguments discussed in Mr. Rose's initial brief, Mr. Rose relies upon that presentation.

CONCLUSION

For each of the foregoing reasons and those stated in his initial brief, the denial of each of Mr. Rose's Rule 3.850 claims was erroneous. This Court should reverse and remand the case for an evidentiary hearing -- as the State

conceded on a number of claims in their response to the Motion to Vacate (R. 117).

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 25, 1991.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

JOHN S. SOMMER
Staff Attorney
Florida Bar No. 0862126

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

Copies furnished to:

Celia Terenzio
Assistant Attorney General
Palm Beach County Regional Service Center
111Georgia Avenue, Room 204
West Palm Beach, Florida 33401